IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No. 1477 of 2004

For Approval and Signature :

HONOURABLE MR.JUSTICE C.K.BUCH

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1	Whether Reporters of Local Papers may be allowed to see the judgment ?	
2	To be referred to the Reporter or not ?	
3	Whether their Lordships wish to see the fair copy of the judgment ?	
4	Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?	
5	Whether it is to be circulated to the civil judge ?	

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ABHAY HARINANDAN OZA - Appellant(s)
Versus
THE STATE OF GUJARAT - Opponent(s)

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Appearance :
MR JB PARDIWALA for Appellant(s) : 1,MR ABHAYKUMAR P SHAH for Appellant(s) : 1,
MR PD BHATE, LD.APP for Opponent(s) : 1,

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CORAM : HONOURABLE MR.JUSTICE C.K.BUCH

Date : 11/10/2007

ORAL JUDGMENT

1. Heard Shri J.B. Pardiwala, learned counsel appearing for the appellant and Shri P.D. Bhate, learned Additional Public Prosecutor, appearing for the respondent-State.

2. The appellant-orig.convict (hereinafter

referred to as 'the appellant') has preferred present appeal challenging the judgment and order of conviction and sentence dated 02nd September 2004 passed by the learned Sessions Judge, Valsad, in Sessions Case No.488 of 2002 (Old No.171 of 2001), whereby the learned trial Judge has held the appellant guilty for the offence punishable under Sections 498(A) and 306 of the Indian Penal Code and sentenced him to undergo rigorous imprisonment for two years and a fine of Rs.1000/- and in defualt to undergo simple imprisonment for one month for the offence punishable under Section 498(A) of the Indian Penal Code and so far as the offence punishable under Section 306 of the Indian Penal Code is concerned, he is sentenced to undergo rigorous imprisonment for seven years and a fine of Rs.5000/- and in default of payment of fine to undergo simple imprisonment for seven months.

3. Shri J.B. Pardiwala, learned counsel appearing for the appellant, has taken me through the various grounds of challenge mentioned in the

memo of the appeal as well as the finding of guilt recorded by the learned trial Judge. The R & P is before the Court and from the paper-book I have been taken through the depositions of 8 witnesses recorded during the course of trial and also through other 13 documents seen and evaluated by the learned trial Judge referred to in paragraph no.6 of the judgment and order under challenge. According to Shri Pardiwala, the finding of the learned trial Judge holding the appellant guilty of the charge of offence punishable under Section 306 of the Indian Penal Code is erroneous because the learned trial Judge has erred in appreciating the scheme of Section 306 of the Indian Penal Code. The evidence in this regard has not been appreciated correctly and, therefore, the conviction under Section 306 of the Indian Penal Code recorded by the learned trial Judge may be quashed and set aside and the appellant may be acquitted from the said charge. During the course of arguments, Shri Pardiwala has fairly accepted that in view of

the nature of evidence led by the prosecution, mainly the oral version of the complainant, certain documents, including the letters written by the victim-deceased at her parental home and also to her friend, and certain remarks made by the doctor who performed the autopsy, the conviction recorded by the learned trial Judge for the offence punishable under Section 498(A) of the Indian Penal Code is not found assailable and, therefore, present appeal may be considered as an appeal against the judgment and order of conviction recorded qua the offence punishable under Section 306 of the Indian Penal Code only. Shri Pardiwala has instructions not to press the present appeal qua the offence punishable under Section 498(A) of the Indian Penal Code.

4. According to Shri P.D. Bhate, learned Additional Public Prosecutor, the learned trial Judge has rightly appreciated the evidence and recorded the finding of guilt qua the offence punishable under Section 498(A) of the Indian Penal Code. To appreciate the rival

contentions so far as the reference to finding of guilt recorded by the learned trial Judge for the offence punishable under Section 306 of the Indian Penal Code is concerned, it would be beneficial to state the basic case of the prosecution in brief, which is reflected in the charge framed at Ex.6 while commencing the trial, which is as under :

"That on 25th June 2001 at 23-15 hours or any time prior to that you the accused had been oftenly demanding money from your wife Ketaben-deceased towards dowry. Thus, by oftenly demanding money by way of dowry from her, and as the same could not be fulfilled, you had given her physical and mental harassment/ cruelty in respect of dowry money inspiring her to commit suicide or to cause grave injury or danger to life, limb or health (whether mental or physical); and by doing so you the accused have committed an offence punishable under Sections 3 and 4 of the Dowry Prohibition Act as well as Section 498(A) of the Indian Penal Code.

Further, because of the physical and mental harassment/ cruelty being meted out to the deceased-Ketnaben she committed suicide on 25th June 2001 at about 11-15 p.m. at your house situated at No.B-5, Punit Plot, Dharampur Road by consuming poisonous liquid namely Baygon Spray and for committing the said suicide, you had inspired/ abetted her and by doing so you have committed an offence punishable under Section 306 of the Indian Penal Code."

5. On plain reading of the evidence led by the prosecution, it is clear that the learned trial Judge has rightly held the appellant guilty for the charge of offence punishable under Section 498(A) of the Indian Penal Code and, therefore, Shri Pardiwala has rightly submitted on instructions that the appeal for that limited purpose is not pressed. Undisputedly, the victim-Ketna committed suicide on 25th June 2001 at about 11-15 p.m. at her matrimonial house situated at Dharampur

Road, Valsad, by consuming Baygon Spray, an insecticide being used for domestic purpose. It is in evidence that on that very day the victim-Ketna was to proceed with her husband and minor child to Bhavnagar and they were to board a train. The journey was arranged and the reservation was also made. The victim-Ketna was literate, self-sufficient and earning lady. So obviously, she was able to stress on her say. It has come on record that they were to proceed to Bhavnagar for one socio-religious ceremony popularly known as “Babri”, a ceremony where hairs of new born baby are removed at a holy place decided by the family members or as per their caste customs. The appellant was of the view that his sister should also accompany them; on the other hand, the victim-Ketna was of the view that her brothers-in-law i.e. elder and younger brother of the appellant, should accompany them or they should participate in the said ceremony. It is in evidence that she had expressed that she would not travel to

Bhavnagar if her sister-in-law is to accompany them or to participate in the said “Babri” ceremony. There is reference of one Shri Mapara, who according to the appellant was asked to intervene in the matter and was a person who had attempted to pursue victim-Ketna to give up the differences and to proceed the journey but he had also failed. The report in respect of the incident in question was given by the appellant to the police. It is in evidence that he was the person who took victim-Ketna to the hospital where she was declared dead. The learned trial Judge has considered some conflict which is there in the report given to the police. According to Shri Pardiwala, this alleged conflict does not establish the guilt of the appellant qua the offence punishable under Section 306 of the Indian Penal Code. Whether the appellant was present in the house when victim-Ketna consumed poison or he had been to railway station for cancellation of tickets, keeping the settled legal position in mind,

would not be a matter of much relevance because in past the victim-Ketna had expressed her views that she might end her life at any point of time because of the strained or unharmonious relations between herself and the appellant. It appears that when the victim-Ketna consumed Baygon Spray (poison), perhaps only child might be there in the house. There is no evidence on record to show as to at what point of time the tickets were cancelled by the appellant. No independent evidence is available on record from the neighbourhood that any quarrel or untoward incident had occurred immediately prior to 11-15 p.m. The injuries which were noticed by the doctor who had performed autopsy, and the other documentary evidence which establishes some cruel behaviour of the appellant, according to Shri Pardiwala, are not sufficient to link the appellant with the crime because the prosecution is under obligation to establish the abetment within the meaning of Section 107 of the Indian Penal Code and there must be

evidence to show that the accused falls in the category of abettor defined in Section 108 of the Indian Penal Code. The act of cruelty even if is found established would not help the prosecution because abetment is a distinct offence. Shri Pardiwala has placed reliance on various decisions and in sum and substance, the say of Shri Pardiwala is that it is the experience of the society that there are disputes at the matrimonial home and a wife is often harassed by her husband and in-laws. However, this by itself would not be sufficient to link the appellant with the offence punishable under Section 306 of the Indian Penal Code. Something more is required to be established to attract the provisions of Section 306 read with Section 107 of the Indian Penal Code. Shri Pardiwala has taken me through one decision in the case of ***Bhagwan Das v. Kartar Singh and others, reported in JT 2007(7) SC 36***. By referring to two decisions in the case of ***Randhir Singh and another v. State of Punjab, reported in 2004 (13) SCC 129***

and in the case of ***State of West Bengal v. Orilal Jaiswal, reported in JTS 1993(6) SC 69***, the Apex Court dismissed the appeal. In the cited decision of Bhagwan Das (supra), the appellant-Bhagwan Das was the father of the victim-deceased and feeling aggrieved by the order of acquittal of the High Court remitting the matter to the lower Court for trial for the offence punishable under Section 498(A) of the Indian Penal Code only, observing that that there is no scope to try the accused for the offence punishable under Section 306 read with Section 34 of the Indian Penal Code, the appellant-father of the victim carried the said order passed by the High Court to the Apex Court because the say of the appellant before the Apex Court was that the accused was guilty for the charge of offence punishable under Section 306 read with Section 34 of the Indian Penal Code. So at the stage of framing of the charge, the issue was taken to the High Court by the accused and thereafter, the father of the victim-deceased to the Apex

Court. It would be beneficial to reproduce the relevant paragraph nos.13 and 14 of the cited decision in the case of Bhagwan Das (supra), which are as under :

> *“13. In Randhir Singh & Anr. vs. State of Punjab 2004(13) SCC 129, it was observed that "more active role which can be described as instigating or aiding the doing of a thing is required before a person can be said to be abetting the commission of offence under Section 306 IPC."*
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> *14. In the same decision it was observed following the decision in State of West Bengal vs. Orilal Jaiswal 1994(1) SCC 73 that :*
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> > *"the courts should be extremely careful in assessing the acts and circumstances of each case and the evidence adduced in the trial for*

the purpose of finding whether the cruelty meted out to the victim had in fact induced her to end the life by committing suicide. If it transpires to the court that a victim committing suicide was hypersensitive to ordinary petulance, discord and differences in domestic life quite common to the society to which the victim belonged and such petulance, discord and differences were not expected to induce a similarly circumstanced individual in a given society to commit suicide, the conscience of the court should not be satisfied for basing a finding that the accused charged of abetting the offence of suicide should be found guilty."

6. Shri Pardiwala has also placed reliance on one decision of the Apex Court in the case of ***Mahendra Singh and another v. State of M.P.,***

reported in 1995 Supp.(3) SCC 731. In this cited decision, the Apex Court was dealing with the case where there was an evidence in the form of dying declaration before the Apex Court for appreciation and the Apex Court observed on facts that there are ingredients of abetment. The dying declaration of the victim-deceased (wife) alone is not sufficient to bring the act of appellant-husband, mother-in-law and sister-in-law of the victim-deceased within the scheme of Section 306 of the Indian Penal Code. The conviction for abetment of suicide merely on the allegation of harassment to the deceased is not sustainable.

7. Shri P.D. Bhate, learned Additional Public Prosecutor, after going through the judgment in the case of ***Sushil Kumar Sharma v. Union of India and others, reported in 2005 Cr.L.J. 3439***, and mainly the observations made in paragraph no.10 of the cited decision and also through one recent judgment of the Apex Court

decided on 19th June 2007 in the case of ***Kishori Lal v. State of Madhya Pradesh, reported in 2007 Cr.L.R. SC 502***, has fairly submitted that the evidence of prosecution if is read as it is, in the present case it would be difficult for the Court to link the appellant with the offence punishable under Section 306 of the Indian Penal Code. In response to the query raised by the Court, Shri Bhate has submitted that the learned trial Judge has fairly made distinction between the cruelty and the act of abetment keeping in mind the scheme of Sections 107, 108 and 109 of the Indian Penal Code. It would be beneficial to reproduce the relevant paragraph no.6 of the cited decision in the case of Kishori Lal (supra), which is as under :

> *"6. Section 107 IPC defines abetment of a thing. The offence of abetment is a separate and distinct offence provided in the Act as an offence. A person, abets the doing of a*

thing when (1) he instigates any person to do that thing; or (2) engages with one or more other persons in any conspiracy for the doing of that thing; or (3) intentionally aids, by act or illegal omission, the doing of that thing. These things are essential to complete abetment as a crime. The word "instigate" literally means to provoke, incite, urge on or bring about by persuasion to do any thing. The abetment may be by instigation, conspiracy or intentional aid, as provided in the three clauses of Section 107. Section 109 provides that if the act abetted is committed in consequence of abetment and there is no provision for the punishment of such abetment, then the offender is to be punished with the punishment provided for the original offence. 'Abetted' in Section 109 means the specific offence abetted. Therefore, the offence for the

abetment of which a person is charged with the abetment is normally linked with the proved offence."

8. True it is that in the case of Sushil Kumar (supra), the Apex Court was dealing with the constitutional validity and vires of the scheme of Section 498(A) of the Indian Penal Code, but the observations made in paragraph no.10 of the said decision, according to Shri Bhate, are relevant. It is observed by the Apex Court that "O*ne another provision which is relevant to be noted is Section 306 IPC. The basic difference between the two Sections i.e. Section 306 and Section 498A is that of intention. Under the latter, cruelty committed by the husband or his relations drag the women concerned to commit suicide, while under the former provision suicide is abetted and intended."*

9. The Court is of the view that in the present case the prosecution ought to have led some evidence to show that the appellant had

actually abetted the act of suicide or any act or omission of the appellant was intended to see that the victim commits suicide. In absence of any such evidence, the learned trial Judge ought not to have linked the appellant with the crime.

10. In view of above, in absence of convincing evidence to prove abetment and the intention of the appellant in this regard, the appellant should be given at least benefit of doubt. One person namely Shri Mapara, would have thrown some light in that direction but the prosecution could not examine this witness. The circumstances emerging from evidence show that this witness had capacity to play a role of a mediator between the husband (appellant) and wife (victim) who were not carrying at least harmony and loving relations. So for want of good convincing and cogent evidence, it would not be safe for this Court to link the appellant with the crime on either conjectures or surmises. The finding of the learned trial Judge is found based on such

conjectures and surmises which is reflected in the judgment in the words like “something must have happened”. Legitimate inference is permissible but such inference can be said to be legitimate when it is based on available convincing legal evidence, otherwise such inferences can be termed as conjectures or surmises.

11. In view of the aforesaid observations and discussion, the present appeal against the judgment and order of conviction and sentence passed by the learned Sessions Judge, Valsad, in Sessions Case No.488 of 2002, qua the offence punishable under Section 498(A) is hereby dismissed upholding the judgment and order of conviction and sentence. The appeal of the present appellant qua the offence punishable under Section 306 of the Indian Penal Code is hereby allowed by quashing and setting aside the judgment and order of conviction and sentence qua that part under challenge. The appellant is hereby ordered to be acquitted from the charge of the offence punishable under Section 306 of the Indian

Penal Code by giving him benefit of doubt.

12. If the appellant has already served the sentence imposed by the learned trial Judge qua the offence punishable under Section 498(A) of the Indian Penal Code, he is ordered to be set at liberty forthwith, provided he is not required by the Jail Authority for any other purpose. The amount of fine, if any paid qua the offence punishable under Section 306 of the Indian Penal Code, be refunded to the appellant on proper identification.

13. The Registry is directed to intimate the Jail Authority at Vadodara where the appellant at present is serving the sentence imposed by the learned trial Judge, with respect to the present order forthwith.

(C.K. Buch, J)

Aakar